

Damaging the Legitimacy of the Spanish Constitutional Court

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In October 2015, in the midst of a legal fight between the Spanish Constitutional Court and the Parliament of Catalonia on the right to hold an independence referendum, Spain passed a reform of the [Law governing the competencies and functioning of the Constitutional Court](#). The intention was to ensure "the execution of the judgments of the Constitutional Court as a guarantee of the rule of law." From the very first moment this norm was controversial among Spanish constitutionalists. The reason was not its praiseworthy objective, since no one denies the need for the decisions of the Constitutional Court to be carried out, but rather the way chosen for doing so: the Court itself received powers for imposing high pecuniary sanctions, suspending public officers, and overriding by their own initiative any public act opposed to their decisions.

The reform was [challenged before the Court itself](#), which – as usual – validated it without going too deeply into the issues raised: The Court mainly emphasized that the configuration of the execution of court decisions falls into the competence of the legislative. The Judgment had three dissenting opinions, raising enough questions for [Spanish scholars to get doubts about it](#).

Earlier, a committee of the Parliamentary Assembly of the Council of Europe had asked the Venice Commission, a scientific advisory body on matters constitutional to the Council of Europe, for an opinion on the adequacy of the reform to the common European standards. A few days ago, the Venice Commission has published [the requested opinion](#).

Rarely a technical report has ever had such an impact on the Spanish public opinion. The reason is that beyond its technical content, it was presented in the media as an international statement supporting or criticising the actions taken by the Spanish Government in order to stop the Catalan independence process. That was misleading. The Venice Commission did not take a side: it clearly reaffirms the need to comply with the decisions of the Constitutional Court. It does not believe, though, that the body responsible for ensuring this compliance should be the Court itself.

The opinion emphasizes that after this legal reform, the Spanish Constitutional Court is the only one in Europe with such powers. It is, therefore, a very exceptional competence, which raises problems especially regarding the suspension from office of elected officials, the coercive penalty payments applied on individuals without the guarantees of the due process and the action of the court on its own motion for suspending public acts.

The text concludes by stating categorically: "The Venice Commission does not recommend that these powers be attributed to the Constitutional Court. However, in the light of the absence of common European standards in this field, the introduction of such powers does not contradict such standards." In other words, the Commission opposes the reform, but notes that there are no common European standards on the subject and, thus, no objective basis for a negative opinion.

The main problem remains, however, the role assigned to the Constitutional Court in the face of the so-called 'sovereignist challenge'. In this respect the High Court has clearly become a judge of the symbolic rather than a judge of the law. It is currently overriding political declarations without any legal effect, just because of the ideological principles contained in them. Therefore its decisions do not overturn any concrete legal act but issue a prohibition to the Catalan Parliament of making ideological pro-independence statements. In this context, the procedure for execution of judgments is being [used to override new parliamentary acts](#) (which should have been challenged

through different constitutional processes) simply because they share the same ideological principles. Any new Catalan action that supports the start of a Catalan constituent process will be immediately considered as a further disobedience. And it will be for the Constitutional Court itself to suspend such actions, by its own motion, and to punish the elected officials involved in such symbolic declarations. This is the reason for the sudden enthusiasm of Spanish Government for giving additional powers to the court to execute its judgments, and the reluctance of Catalan authorities to accept it.

A doubt rises, however: to use the Constitutional Court as the main barricade against any attempt at starting the independence process does tremendous damage to the Court itself as it undermines its perception as neutral arbiter and, thereby, its legitimation. This is why the Venice Commission is so concerned about that law. And so are many of us.

A Spanish version of this article has previously appeared on [Agenda Pública](#).

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SUGGESTED CITATION Urías, Joaquín: *Damaging the Legitimacy of the Spanish Constitutional Court*, *VerfBlog*, 2017/3/27, <http://verfassungsblog.de/damaging-the-legitimacy-of-the-spanish-constitutional-court/>, DOI: <https://dx.doi.org/10.17176/20170327-210800>.